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In The

# Supreme Court of the United States

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS,

*Petitioners,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

*Respondents.*

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

## BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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## INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of the petitioners. The letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop land. Therefore, it is concerned with any judicial decision that affects the activities that a landowner may conduct on its own property.

The central issue in this case concerns the spectrum of activities that require federal approval from the Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") through the permitting programs of the Clean Water Act ("CWA"). These are some of the most common permits that NAHB's members must obtain in their projects to provide housing for the Nation's citizens. *Amicus* submits that the agencies often compel our members to apply for CWA permits beyond the scope of Congressional authority. To curb this abuse of authority, since 1991 NAHB has participated in numerous lawsuits—

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[1]Pursuant to Rule 37.6 of this Court, amicus state that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

both as a named party and as an *amicus*—to police the CWA's permitting programs and ensure that the agencies are not extending their authority in an unauthorized manner.

## INTRODUCTION

The Court recently affirmed that federal regulatory authority under the CWA has limits. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001) (*"SWANCC"*), the Court ruled that the CWA only reaches waters with a connection to "navigability" and that the statute cannot be stretched to encompass isolated, intrastate waters. While *SWANCC* addressed the *geographic* extent of CWA jurisdiction, the petition before the Court addresses the types of *actions* that Congress intended to regulate.

As discussed below, the CWA requires permits for "discharges" of pollutants into navigable waters. *See* 33 U.S.C. §§ 1342, 1344. The statute defines "discharge" to be an "addition." *Id.* at § 1362(12). Thus, the courts have held that an addition of material is required to trigger statutory coverage under section 404, but that other activities which remove material are not covered by that section. *National Mining Ass'n v. U. S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998); *Save Our Community v. U.S.E.P.A.*, 971 F.2d 1155, 1162 (5th Cir. 1992); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 922-25 (5th Cir. 1983).

The Ninth Circuit's decision, however, ignores that statutory language and caselaw. Offended by petitioner's "deep ripping," a form of plowing used to prepare soil for the deep roots of orchards and vineyards, the Ninth Circuit



held that "activities that destroy the ecology of a wetland are not immune from [CWA] jurisdiction merely because they do not involve the introduction of material brought in from somewhere else . . . [petitioner's activity] constitutes environmental damage sufficient to constitute a regulable redeposit." *Borden Ranch Partnership v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 814, 815, and n.2 (9th Cir. 2001). Yet Congress did not intend to regulate any activity that impacts a wetland; only a statutory "discharge" will suffice. By concluding that jurisdiction is triggered by "damage" rather than a "discharge," the Ninth Circuit has reinterpreted the CWA to regulate more activities than Congress and other federal circuit decisions allow.

Based on the agencies' past response to judicial decisions, NAHB submits that the Corps and EPA will attempt to use the Ninth Circuit's opinion to justify federal regulation over a vast spectrum of soil movements (not just plowing) in all CWA jurisdictional waters. Indeed, a joint Corps/EPA regulation issued in January 2001 currently (and illegally) "regards" that any "earth-moving activity" caused by a machine results in a statutory "discharge" and thus requires a section 404 permit. *See* 66 Fed. Reg. 4550, 4575 (2001) (codified at 33 C.F.R. § 323.2 (2001)).

The Corps' and EPA's excessive assertions of jurisdiction, including those underlying the *Borden Ranch* decision and embodied in the January 17, 2001 regulation, will continue until checked by this Court. The petition should therefore be granted.

## REASONS FOR GRANTING THE PETITION

### I. SUPREME COURT REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT REINTERPRETED THE CLEAN WATER ACT TO REGULATE MORE ACTIVITIES THAN CONGRESS AND OTHER FEDERAL CIRCUIT DECISIONS ALLOW.

CWA Section 301(a) prohibits the "discharge of any pollutant" *except* as authorized by other sections of the statute. 33 U.S.C. § 1311(a). Section 404 is one such exception. It authorizes the Corps to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. Section 402 is another exception to the discharge prohibition. It allows EPA and delegated states to issue permits for discharges of other pollutants, such as industrial and municipal waste. 33 U.S.C. §§ 1342, 1362(6).

The CWA makes plain that the existence of a "discharge" is the critical, deciding factor in determining its reach. The statute, in turn, defines "discharge" to require an "addition" of a pollutant. *Id.* at § 1362(12). This is the crucial point: Congress only intended to regulate activities that *add* pollutants to navigable waters. Other actions like plowing, excavating, or draining may adversely affect wetlands by moving soil and vegetation but they are beyond the CWA's scope unless material is *added.* Conversely, a discharge that adds material is regulated even where no damaging effects occur.



The Ninth Circuit, however, failed to follow the plain requirements of the CWA. It has allowed the agencies to assume jurisdiction over an activity based on its environmental effects, even when there is no addition of dredged material.

#### A. Prior Court Decisions Make Clear That CWA Jurisdiction Is Triggered By Discharges, Not Effects.

##### 1. Section 404 Cases

The Ninth Circuit's opinion virtually ignores the decision of the D.C. Circuit in *National Mining,* where the court ruled:

> [T]he straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition of material, it cannot be a discharge . . .. In fact the removal of material *from* the waters of the United States, as opposed to the discharge of material *into* those waters, is governed by a completely independent statutory scheme. . . . [T]he [Rivers and Harbors Act of 1899] covers the act of dredging, while [CWA] Section 404 [] covers the disposal of the dredged material.

145 F.3d at 1404 (emphasis added) (citations omitted). The agencies argued that soil material becomes a pollutant

once it is excavated and that the soil material that inevitably falls off a shovel during such excavation is therefore a discharge of a pollutant. But the D.C. Circuit held that there can be no "addition" of a pollutant without an addition of material. *Id.*

The Fifth Circuit has likewise decided that a discharge into navigable water, not the environmental effect of an activity, is the jurisdictional prerequisite for regulation under Section 404. In *Save Our Community*, a landfill operator proposed to drain several man-made ponds within the site to make them suitable for landfill use. The Corps and EPA agreed that the operator's draining activities were not regulated because they did not result in an addition of dredged or fill material. The district court held that the proposed activity would destroy wetlands and therefore required a permit, but the Fifth Circuit reversed, holding that "absent a finding of discharge, draining activity that converts a wetland does not trigger section 404 jurisdiction." *Save Our Community*, 971 F.2d at 1165-66. The court observed that "the federal government has not taken upon itself to resolve all environmental issues which arise in the United States." *Id.* at 1164; *see also National Mining*, 145 F.3d at 1410 (if the agencies believe that the CWA inadequately protects wetlands because the statute insists upon an "addition" to trigger jurisdiction, "the appropriate body to turn to is Congress.").[2]

[2]In his dissent below, Judge Gould understood that only discharges adding pollutants could trigger Section 404 permitting requirements, not a test based on an activity's degrading effects to a wetland. He remarked that, as a result of deep-plowing, "the hydrological regime is modified, but Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil. If Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit." *Borden Ranch Partnership v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 820 (9th Cir. 2001) (Gould, J., dissenting).



And the Eighth Circuit, addressing the same issue from the other end of the rule, has also held that a discharge, not effects, is the deciding factor in triggering CWA jurisdiction. In *Minnehaha Creek Watershed Dist. v. Hoffman*, the lower court held that the construction of dams and placement of riprap into lake waters did not constitute a discharge because there was no evidence that the activities would have detrimental effects. But the Eighth Circuit held that, if a discharge occurs, it will still be regulated regardless of whether the activity involves a "significant alteration in water quality." 597 F.2d 617, 626-27 (8th Cir. 1979).

### 2. Section 402 Cases

Decisions interpreting CWA section 402 have adopted the same analysis. Thus, dams that cause water quality changes in navigable water without adding pollutants do not require a section 402 permit. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). Likewise, the Sixth Circuit has held that a Section 402 permit is required only where there is an addition of a pollutant from a point source, not where a dam "merely transmit[s] the water coming into it, in whatever altered form." *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988).

In summary, the decisions interpreting sections 402 and 404 make clear that the CWA's prohibitions are triggered by discharges, not effects. The Ninth Circuit's decision below, which premises CWA jurisdiction on

effects, not discharges, represents a break with consistent caselaw and creates a split in the circuits that warrants this Court's review.

### B. CWA Jurisdiction Is Triggered By Discharges *Into* Navigable Water of Material Dredged *From* Such Water.

#### 1. The Ninth Circuit Was Wrong About *Rybachek* and *Deaton*.

The Ninth Circuit relied on two prior decisions to find that petitioner's deep ripping qualified as a "discharge." Both of the prior decisions, however, addressed material that was first "dredged" or "excavated" *from* water, then subsequently discharged *into* navigable water. *Rybachek v. U.S.E.P.A.*, 904 F.2d 1276, 1285 (9th Cir. 1990) (where streambed is excavated, then processed to extract gold, subsequent discharge of sifted material into navigable water is regulable); *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000) ("the contractor removed earth and vegetable material *from* the wetland… once that material was *excavated from* the wetland, its redeposit in that same wetland added a pollutant…") (emphasis added).

In clear contrast to *Rybachek* and *Deaton*, petitioner moved material in waters but did not dredge material *from* a water and subsequently "discharge" it "*into*" a navigable water. The D.C. Circuit recognized this distinction in *National Mining*. 145 F.3d at 1406 ("*Rybachek* would help the agencies if [it held that fallback during placer mining constituted a discharge], but instead it identified the regulable discharge as the discrete act of dumping leftover material into the stream *after* it had been processed.") (emphasis added). The Ninth Circuit, however, simply excised the jurisdictional trigger of a "discharge of dredged or fill material *into* the navigable waters" and rewrote Section 404 to regulate soil movements that cause "damage." 33 U.S.C. § 1344 (emphasis added).



#### 2. Section 404 Does Not Apply To Soil Movements *Per Se*, Absent A Discharge.

Whether petitioner's actions triggered federal jurisdiction turns on whether "dredged or fill material" was discharged. "Fill material" is material "used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(e). The regulatory definition of "discharge of fill material" specifically excludes

> plowing, cultivating, seeding and harvesting for the production of food, fiber and forest products.

*Id.* at § 323.2(f). Thus, petitioner's activities cannot be a discharge of fill material because (1) they were not conducted for the primary purpose of changing the bottom elevation or creating dry land, and (2) they do involve plowing for the production of food products.

Nor can they be a "discharge of dredged material." "Dredged material" is "material that is excavated or dredged from waters of the United States." *Id.* at § 323.2(c). Material must actually be dredged to be "dredged material." The term "dredged" is not defined in the CWA, and Corps regulations simply define "dredged material" as "material that is excavated or dredged from

waters of the United States." 33 C.F.R. § 323.2(c). The ordinary meaning of "dredge" is

> *v.* **1** *tr.* **a** (often foll. by *up*) bring up (lost or hidden material) as if with a dredge (*don't dredge all that up again*). **b** (often foll. by *away*, *up*, *out*) bring up or clear (mud, etc.) from a river, harbor, etc. with a dredge. **2** *tr.* clean ( a harbor, river, etc.) with a dredge…

Oxford American Dictionary, 291 (Oxford University Press 1999). Thus, the term "dredge" essentially means to bring material up and clear it away from a waterbody (to allow, for example, the transit of boats engaged in interstate commerce). It follows that "dredged material" is material that is actually dredged from a waterbody, not soil that is merely churned but not "dredged from" the area. Indeed, as the Corps' regulations recognize, "dredged material" is material that has been "dredged *from* waters." 33 C.F.R. § 323.2(c) (emphasis added).[3]

Taken together, these points demonstrate that, under the plain language of CWA Section 404, federal jurisdiction over discharges of dredged material is triggered only if (1) material (2) that has been dredged (3) is added (4) to navigable water. Activities in navigable waters that may cause "environmental damage" or

[3]Dredging itself is not regulated by Section 404, but rather by the Rivers and Harbors Act of 1899. Section 404 regulates the discharge of material that has been dredged. *See* 33 U.S.C. § 403 and *National Mining*, 145 F.3d at 1404 (the Rivers and Harbors Act covers the act of dredging, while the CWA covers the disposal of the dredged material).



"redeposits" simply are not regulable discharges of dredged material unless these elements are met.

By reinterpreting Section 404 to regulate movement of soil that causes damage rather than "additions," the Ninth Circuit's decision exceeds the CWA's jurisdictional framework and creates a conflict between the federal circuits.

## II. SUPREME COURT REVIEW IS NECESSARY TO CORRECT THE AGENCIES' ABUSES OF THE TERM "DISCHARGE" AND TO CONFIRM THAT THE CWA ONLY REACHES ACTIVITIES THAT *ADD* MATERIALS.

Since 1991 the Corps and EPA have issued three separate regulations and innumerable bits of "guidance," all in an effort to define "discharge of dredged material." In so doing, the agencies have alchemized "discharge" to cover sweeping categories of activities that cannot remotely be construed to "add" anything to jurisdictional waters. Even if the subject activity *removes* or *excavates* material, the Corps and EPA would nonetheless require a section 404 permit through its regulations.

The timeline below lays bare the agencies' extra-jurisdictional attempts to regulate based on environmental effects. It chronicles the "pull" of the courts to narrow the definitional term "discharge" and the agencies' reactive, expansive "push" to cover virtually any action that subtracts soil from, or moves soil around in, a navigable water. Such regulatory overreach will continue unabated unless the Court reigns in the agencies and reviews the Ninth Circuit's decision.

### A. 1977-1991: Early Regulations Were Faithful To The CWA.

During the first 18 years that the Corps and EPA enforced the CWA, they faithfully interpreted Section 404 in a manner confirming that "discharge" required an addition of materials. In 1977, the Corps promulgated final regulations defining the term "discharge of dredged material" as "any addition of dredged material into waters of the United States." 42 Fed. Reg. 37,122, 37,145 (1977). Guidance issued in 1981 and reissued in 1984 reinforced the understanding that additions were regulated, but removals and other soil movements were not:

> [Section 404] does not authorize the Corps to regulate dredging in [waters of the United States] . . .. *De minimus* discharge occurring during normal dredging operations, such as the drippings from a dragline bucket, is not considered to be a Section 404 discharge.[4]

In 1986 the Agencies issued revised Section 404 regulations that remained consistent with the idea that activities involving incidental soil movement were not regulated. *See* 33 C.F.R. § 323.2(d) (1992) (Corps regulations); 40 C.F.R. § 232.2(e) (1992) (EPA regulations). In the preamble to its 1986 regulations, the Corps plainly acknowledged: "We have consistently provided guidance to our field offices since 1977 that

[4]U.S. Army Corps of Engineers, Regulatory Guidance Letter 81-4: Application of Section 404 to Dredging Projects ¶¶ 1-2 (June 3, 1981); U.S. Army Corps of Engineers, Regulatory Guidance Letter 84-4: Application of Section 404 to Dredging Projects ¶¶ 2-3 (Mar. 23, 1984) (reissuance of RGL 81-4).



incidental fallback is not an activity regulated under section 404." 51 Fed. Reg. 41,206, 41,210 (1986).

### B. 1991: Tulloch 1 Rule Regulates "Incidental Fallback."

The regulatory landscape shifted in 1991, when environmental groups sued the agencies and two landowners, alleging that the landowners' clearing and excavation activities destroyed and degraded wetlands and therefore should be subject to Section 404 regulation. *North Carolina Wildlife Fed'n v. Tulloch,* No. C90-713-CIV-5-BO (E.D.N.C. 1992). Rather than defend the lawsuit, the Corps and EPA settled by agreeing to amend their rules to regulate landclearing and excavation. On August 25, 1993, the agencies adopted a final rule—commonly known as the Tulloch Rule (hereafter, "Tulloch 1")—that was virtually identical to the language dictated by the parties' settlement agreement. *See* 58 Fed. Reg. 45,008 (1993).

Tulloch 1 purported to extend the agencies' authority to a new category of activity known as "incidental fallback": "any redeposit of dredged material . . . which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 58 Fed. Reg. at 45,035, 45,037. Because it is "virtually impossible" to excavate or clear land without causing some incidental soil movement (*see id.* at 45,017), and because such incidental soil movement was now considered a "discharge," *for the first time since the CWA's inception,* Tulloch 1 required a Section 404 permit for all actions that removed soils from, or pushed soils in, jurisdictional waters. The agencies acknowledged that their decision to now regulate activities causing only

incidental fallback was not driven by concern about the incidental soil movement itself, but rather by concern about adverse effects resulting from disturbance of soils in waters of the United States. *See* 58 Fed. Reg. at 45,019. Characterizing incidental soil movement as a "discharge" thus provided the pretext for regulating removal, ditching, plowing, and other soil-moving activities that the agencies had no authority to regulate directly under the Act.

### C. 1997-1998: Federal Courts in the D.C. Circuit Strike Tulloch 1 as Facially Invalid, Because the Rule Regulated Activities that Did Not Add Materials.

In 1993, *Amicus* NAHB and other trade groups challenged Tulloch 1 as exceeding the Corps' and EPA's authority. The U.S. District Court for the District of Columbia agreed with NAHB. Recognizing that Section 404 only regulates "discharges" (and not removal or soil disturbance *per se*), the district court found Tulloch 1 "inconsistent with the language and intent of the [CWA]." *American Mining Congress v. U.S. Army Corps of Eng'rs,* 951 F.Supp. 267, 270 (D.D.C. 1997). "[Congressional] understanding of 'discharge' excludes the small-volume incidental discharge that accompanies excavation and landclearing activities." *Id.* at 273. Accordingly, the district court "declared [Tulloch 1] invalid" and entered a permanent injunction ordering the agencies "not to appl[y] or enforc[e]" the rule. *Id.* at 278.

The U.S. Court of Appeals for the D.C. Circuit affirmed without a dissent in *National Mining*. The appeals court examined the administrative record and concluded that Tulloch 1 stretched federal authority to reach, among other things, the "soils and sediments [that]



fall from the bucket" during excavation operations, and the "scrap[ing] or displac[ement of] wetland soil" during mechanized landclearing." 145 F.3d at 1403 (citing Tulloch 1 preamble, 58 Fed. Reg. at 45,017-018). However, such an extension of authority flouted Congress's definition of "discharge" because it did not require some "addition" of material. *Id.* at 1404. Simply, "how [can there] be an addition of dredged material when there is no addition of material"? *Id.*

### D. 1997-1999: Corps and EPA Efforts to Circumvent the *AMC* and *NMA* Opinions and Regulate Excavation and Other Soil Movements *Per Se*.

The Corps and EPA responded with a campaign of resistance to *AMC* and *National Mining*. An EPA official derided these decisions as creating a "loophole" in the statute. Memorandum from J. Charles Fox, Assistant Administrator for Water, to The Administrator, "Impacts to Public Health and the Environment Associated with the 'Tulloch' Decision—ACTION MEMORANDUM" (June 1, 1999). The Corps also issued a document styled as "'Interim, Interim' Information Regarding the 'Excavation Rule' Decision, American Mining Congress v. Corps" (February 13, 1997)). The "Interim, Interim Information" instructed Corps field officials that they could properly assert jurisdiction over incidental fallback, notwithstanding the result in *AMC*, by bootstrapping authority over some other part of a larger project where a regulable addition of material had in fact occurred. The "Interim, Interim Information" directed that "many projects that could be built with only 'incidental fallback, . . . also need Corps authorization for access roads or other parts of the project . . . [T]he excavation [*i.e.,* non-regulated] part of the project

can be treated as secondary impacts of the parts of the overall project that we do regulate."

Next came "Tulloch 2," an "interim" rule published on May 10, 1999, pending a formal rulemaking to comply with *National Mining*. *See* 64 Fed. Reg. 25,120 (1999). Although styled as an attempt to comply with the *AMC* and *National Mining* decisions, Tulloch 2 was nothing more than a resuscitation of the rejected Tulloch 1 rule. Based on the plain text of Tulloch 2,[5] the agencies continued to unlawfully regulate soil ("excavated material") necessarily displaced as an "incidental" byproduct of landclearing or "other [mechanized] excavation." Because virtually all mechanized operations in jurisdictional waters move around grains of soil, Tulloch 2 regulated a vast array of activities regardless of whether material was actually added to the waterbody.[6]

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[5]The May 10, 1999 rule changed the language of Tulloch 1 as follows: Any addition of dredged material into, including redeposit of dredged material other than incidental fallback, within, the waters of the United States. The term includes, but is not limited to the following:*** any addition, including any redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing . . . or other excavation. 64 Fed. Reg. at 25,123.

[6]The preamble to Tulloch 2 offered a predictably cramped explanation of the minimalist changes made from Tulloch 1. In the Tulloch 2 preamble the agencies stated that *National Mining* invalidated Tulloch 1 *only* because it impermissibly regulated incidental fallback. 64 Fed. Reg. at 25,120. While leaving to another day the question of what types of redeposits might constitute incidental fallback, in one portion of the Tulloch 2 preamble the Corps and EPA declared categorically that soil movements associated with "mechanized landclearing" are



**E. <u>2000:</u> The *AMC* Court Cautions the Agencies Against Taking an "Unduly Narrow" Interpretation of Non-Regulated Activities.**

After Tulloch 2's issuance NAHB returned to the D.C. district court, arguing that the interim rule violated the district court's injunction that forbade the agencies to apply or enforce Tulloch 1. The district court ruled that Tulloch 2 did not violate the injunction because it was only an interim step. However, the court also criticized the agencies' cramped interpretation of incidental fallback, stating that it did "not comport with the Court's understanding . . .." *American Mining Congress v. U.S. Army Corps of Eng'rs,* 2000 U.S. Dist. LEXIS 13953 at *24 (D.D.C. Sept. 13, 2000) (hereafter *"AMC II").* The district court further "caution[ed] [the agencies] against parsing the language of the decisions in *[National Mining]* and *AMC* to render a narrow definition of incidental fallback that is inconsistent with an objective and good faith reading of those decisions." *AMC II,* 2000 U.S. Dist. LEXIS 13953, at *25. To "ensure" that the agencies did not take an "unduly narrow definition" of "incidental fallback," the district court emphasized that the agencies only have authority to regulate some forms of soil redeposits—namely, those that add materials to navigable waters. *Id.* In this regard, the district court emphasized the following language from *National Mining:*

> But [Tulloch 1] makes no effort to draw … a line [between regulated and non-regulated redeposits], and indeed its

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automatically "redeposits…subject to CWA jurisdiction…" *Id.* at 25,121.

> overriding purpose appears to be to expand the Corps' permitting authority to encompass . . . a wide range of activities that cannot remotely be said to "add" anything to the waters of the United States.

*AMC II,* 2000 U.S. Dist. LEXIS 13953, at *17.

### F. 2001: The Agencies Issue Tulloch 3 and "Regard" Vast Categories of Soil Moving Actions as a Regulated "Discharge."

The district court did not strike Tulloch 2, in large measure, because it was an interim rule that would be followed by "a notice and comment rulemaking 'to make a reasoned attempt to more clearly delineate the scope of CWA jurisdiction over redeposits of dredged material.'" *AMC II,* 2000 U.S. Dist LEXIS 13593 at, *19-*20 (citing Tulloch 2, 64 Fed. Reg. at 25,121). That new rule—"Tulloch 3"—is in effect today and governs the agencies' present regulatory regime. Tulloch 3 is another revision of the term "discharge of dredged material." *See* 66 Fed. Reg. 4550 (2001). It suffers from the same defect as its predecessors because it regulates broad categories of activities that move soils *rather than* discharges that add pollutants.

Tulloch 3 declares that, despite whether any addition of material actually occurs, the Corps and EPA "regard" all landclearing and other "earth-moving activity" in navigable waters "as resulting in a discharge of dredged material"—unless the agencies are convinced by "project specific evidence" that the activity results in "only incidental fallback." 66 Fed. Reg. at 4575. Through Tulloch 3, the agencies have effectively presumed that any



earth-moving activity is regulated as a CWA discharge.[7] Whether the activity is plowing or excavation, Tulloch 3 is a sweeping assertion of federal jurisdiction over activities that do not add materials to waters of the United States. Unfortunately and as a result, Tulloch 3 is currently the target of yet another court challenge filed by *Amicus.* See *National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, Civil Action No. 1:01CV00274 (complaint filed Feb. 6, 2001) (consolidated with 1:01CV00320).

With all of their regulatory machinations over the past nine years, the agencies' motivation has become apparent. What they *really* want is to regulate any activity that has an adverse effect on any water anywhere. However, the language of the CWA—specifically the term "discharge of dredged material—sets forth what they may regulate. As the courts in the D.C. Circuit and Judge Gould's dissent below have observed, the agencies should go to Congress to amend the CWA for language that suits their broader agenda.

Borden Ranch's petition provides the Court with the opportunity to clarify the obfuscation that the Corps and EPA have created in the context of one of the CWA's

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[7]When the agencies initially proposed Tulloch 3, they sought to establish a rebuttable presumption that all mechanized earth-moving activities resulted in a regulable discharge. 65 Fed. Reg. 50,108 (Aug. 16, 2000). When they finalized Tulloch 3, the agencies dropped the "presumption" language with the current text that states they "regard" earth-moving activities in waters of the United States as regulated. Tulloch 3, 66 Fed. Reg. at 4575 (Jan. 17, 2001). Word choice aside, the impact on the regulated community is the same: the agencies presume that all mechanized movement of soil in a navigable water will require a section 404 permit.

salient permitting programs. The cycle will continue—more regulatory overreach, followed by more litigation—unless the Court grants the requested petition and clarifies the meaning of "discharge of dredged material."

## CONCLUSION

For the foregoing reasons, the National Association of Home Builders urges the Court to grant Borden Ranch's petition.

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